ALUMINIUM COMPANY OF MALAYSIA BERHAD

v.

NG THAN CHAI & ANOR.

HIGH COURT MALAYA, MELAKA
DATUK WIRA HAJI MOHD NOOR BIN HAJI AHMAD J.
[ORIGINATING MOTION NO. 25-1-93]
19 AUGUST 1994

LAND LAW: Application to remove private caveat - Developer entering into joint-venture agreement with Majlis Daerah Jasin to develop land belonging to the Majlis - Respondent purchasing shophouse to be built on land - Majlis charging land to applicant as security in respect of guarantee given by the Majlis to the applicant - Charge created by the Majlis without approval of the State Authority - Applicant taking steps to realise security - Respondents lodging caveat on land - Whether action of the Majlis ultra vires - Whether the guarantee and charge null and void - Whether the Local Government Act 1976 prohibits the Majlis from giving the guarantee - Consideration of ss. 41(1), 42(1) & (2), 46(1) & (2), 49 of the 1976 Act - Whether the giving of the guarantee and the creation of the charge by the Majlis are reasonable and incidental to the carrying into effect of its statutory purpose under ss. 13, 101(gg) & (hh) of the 1976 Act - Whether the charge is valid by virtue of s. 241 of the NLC - Section 340(2)(b) NLC.

The Majlis Daerah Jasin entered into a joint-venture agreement with a developer to develop a piece of land belonging to the Majlis. On 8 June 1987, the respondent bought a shophouse to be built on the land but on 5 May 1987, the Majlis had already charged the land to the applicant as security in respect of a guarantee given by the Majlis to the applicant for goods supplied by the applicant on credit to a third party. The guarantee and the charge were given and created respectively without the approval of the State Authority. Upon the third party's failure to pay for the goods supplied, the applicant took steps to realise the security. On 27 June 1987 the respondent lodged a private caveat on the land which was subsequently extended. On 12 November 1987, the applicant obtained an order for sale but the auction was unsuccessful.

The issue before the Court was whether the guarantee and charge were null and void on the ground that the actions of the Majlis was *ultra vires*.

Held:

[1] It is settled law that a natural person has the capacity to do all things save such as are forbidden or prohibited by law. But this rule is reversed in the case of a corporate body established by statute (which the Majlis is by virtue of s. 13 of the Local Government Act 1976 (the Act)), and in relation thereto, what the governing statutory provisions do not expressly or impliedly authorise or permit is to be taken to be prohibited, not by virtue of any express or implied statutory prohibition; but by the doctrine of *ultra vires*.

[2] From an examination of the provisions of the Act, the rational behind the need to obtain the approval of the State Authority was the intention of Parliament to ensure that the Majlis was not unnecessarily saddled with debts beyond its means to pay which may adversely effect its authority, integrity and efficiency, and also to safeguard its assets from improper disposal. Thus the Majlis was empowered by the Act only to borrow or obtain an overdraft. Nowhere in the Act was the Majlis either expressly or impliedly empowered to give a guarantee and on this ground alone the charge created in consequence of the guarantee was null and void being *ultra vires*.

[3] No doubt by virtue of s. 13 of the Act, the Majlis as a body corporate, has the power to charge its land under s. 241 of the National Land Code (NLC). However, that power must be exercised in accordance with what is authorised by the Act *viz.* the power to borrow and to mortgage or charge its land under ss. 41, 42 and 46 of the Act. Since the Majlis had no power to give a guarantee in consequence of which the charge was created it could not exercise the power of charging under the NLC.

[4] Subsections (gg) and (hh) of s. 101 of the Act merely empowers the Majlis to do what is stated therein short of empowering it to give the guarantee or create the charge without the approval of the State Authority. It is absurd to suggest that under this further power the Majlis can give the guarantee and create the charge without the approval of the State Authority whereas to borrow and to create the charge under ss. 41, 42 and 46 of the Act, it must obtain such approval. This interpretation is repugnant to the wisdom of Parliament. Therefore, the giving of the guarantee and creation of the charge are clearly not reasonable nor incidental to the carrying into effect of the Majlis' statutory purpose.

[5] By virtue of s. 340(2)(b) of the NLC the applicant's interest in the land is not indefeasible because the registration was obtained by means of a void instrument.

[Application dismissed with cost].

Cases referred to:
Ashbury Railway Carriage & Iron Co. Ltd. v. Riche [1875] LR HL 653 ***(cit)***
Attorney-General v. Great Eastern Railway Co. [1880] 5 AC 473 ***(cit)***
Public Textiles Berhad v. Lembaga Letrik Negara [1976] 2 MLJ 58 ***(cit)***
PP v. Datuk Haji Harun Bin Haji Idris & Ors. [1977] 1 MLJ 180 ***(cit)***
Penang Development Corporation v. Teoh Eng Huat & Anor. [1992] 1 CLJ 476 / [1992] 1 MLJ 749; [1993] 2 MLJ 97 ***(refd)***
Anisminic Ltd. v. Foreign Compensation Commission & Anor. [1969] 2 AC 47 ***(cit)***
Tan See v. Wing Tiek Holdings Bhd. (formerly known as Wing Tiek Hardware Sdn. Bhd.) [1992] 1 CLJ 78 ***(dist)***

Legislation referred to:
Federal Constitution, Article III
Local Government Act 1976, ss. 13, 41(1), 42(1), (2), 46(1), (2), 49, 101(gg), (hh)
National Land Code, ss. 241(3)(a), 340(2)(b)

Other sources referred to:
Wade on Administrative Law, 6th Edn. @ 44

For the applicant - T.L. Gan; M/s. Yong & Partners
For the respondent - Amardas; M/s. S.F. Pang & Chandra

JUDGMENT

Haji Mohd Noor bin Haji Ahmad J:
The applicant seeks *inter alia*, an order to remove a private caveat lodged by the respondent in respect of land held under HS(M) 607, lot no. 28, PT 1003 Mukim Jasin, Melaka (hereinafter referred to as 'the said Land').

The brief facts leading to this application are these. On 25 June 1984, Usahasama Holdings Sdn. Bhd. (hereinafter referred to as 'the developer') entered into a joint-venture agreement with Majlis Daerah Jasin (hereinafter referred to as 'the Majlis') to develop the Jasin Town Commercial Centre (hereinafter referred to as 'the project') on a big piece of land belonging to the Majlis on which the said lands is situated. On 8 June 1987, the respondents bought a shop house to be built by the developer on the said land at RM125,000. Payment has not been made in full and the construction of the shophouse has not been completed. About a month earlier, i.e.. on 5 May 1987, the Majlis charged the said land to the applicant as security in respect of a guarantee given by the Majlis to the applicant for goods supplied by the applicant on credit to Perusahaan Tinggi (M) Sdn. Bhd. The guarantee given and the charge created by the Majlis was done without the approval of the State Authority. Perusahaan Tinggi (M) Sdn. Bhd. failed to honour its obligation to pay for the goods supplied and the applicant took steps to realize the security. On 27 June 1987, the respondents lodged a private caveat on the said land. On 24 September 1987, on an *ex parte* application by the respondents, the caveat was extended. On 12 November 1987, the applicant obtained an order of sale and the acution was done on 12 June 1992 which was not successful.

On the facts, it is evident that:

(1) the Majlis gave a guarantee to the applicant and charged the said land for the purpose;
(2) the guarantee given and the charge created was done without the approval of the State Authority;
(3) the title to the said land does not contain any restriction on creation of the charge.

The central issue in this case which is serious is whether the guarantee and the charge are null and void on the ground of the doctrine of *ultra vires*? The learned Counsel for the applicant contends, if I understand her correctly, that the guarantee and the charge are valid because (i) the Local Government Act 1976 (hereinafter referred to as the 'Act') does not prohibit the Majlis from giving the guarantee, (ii) the giving of the guarantee and the creation of the charge by the Majlis are reasonable and incidental to the carrying into effect of its statutory purpose having regard to its powers under ss. 13 and 101(gg) and (hh) of the Act, (iii) if by reason of Clause 8 (Personal liability of Chargors) and Clause 41 (Chargors as principal debtors) of the Charge Annexure, the charge transaction is tainted with illegality since liability of a debtor is imposed on the Majlis, such illegality can be severed from the rest of the transaction, and alternatively (iv) the guarantee and the charge are two separate matters and if the guarantee is invalid the charge is valid because under s. 241 of the National Land Code (hereinafter referred to as 'the Code'), the Majlis, as a body corporate, has the power of charging its land. On the other hand, the learned Counsel for the respondents asserted that both transactions are null and void being *ultra vires*.

It is settled law that a natural person has the capacity to do all things save such as are forbidden or prohibited by law. But this rule is reversed in the case of a corporate body established by statute (which the Majlis is by virtue of s. 13 of the Act), and, in relation thereto, what the governing statutory provisions do not expressly or impliedly authorise or permit is to be taken to be prohibited not by virtue of any express or implied statutory prohibition but by the doctrine of *ultra vires* [see *Ashbury Railway Carriage & Iron Co. Ltd. v. Riche* [1875] LR HL 653; *Attorney-General v. Great Eastern Railway Co.* [1880] 5 AC 473 @ 481; *Public Textiles Berhad v. Lembaga Letrik Negara* [1976] 2 MLJ 58 @ 63; *PP v. Datuk Haji Harun Bin Haji Idris & Ors.* [1977] 1 MLJ 180 @ 205; *Penang Development Corporation v. Teoh Eng Huat & Anor.* [1992] 1 MLJ 749 @ 754, 755 and 756. Under the broad concept of *ultra vires* developed since the landmark case of *Anisminic Ltd. v. Foreign Compensation Commission & Anor.* [1969] 2 AC 47 as discussed by His Lordship Jemuri Serjan CJ (Borneo) in *Penang Development Corporation v. Teoh Eng Huat & Anor.* [1993] 2 MLJ 97, in the words of His Lordship, the notion of *ultra vires* now encompasses a situation where the public authority commits an error of law albeit that the authorities' action is undeniably of a kind falling within the field of activity allocated to it by the law. Professor Wade in **Wade on Administrative Law** (6th. Edn.) @ 44 commented:

> In general, however, the Courts adhere firmly to the wide meaning of 'jurisdiction', since this is the sheet-anchor of their power to correct abuses. They appear to be willing to stretch the doctrine of *ultra vires* to cover virtually all situations where statutory power is exercised contrary to some legal principle...

Thus, where official action while being within the scope of the authority of the law or a corporation if it becomes erroneous on some grounds such action would now be described as *ultra vires*, being outside a jurisdiction, under the broad concept of *ultra vires*.

Let us examine the relevant provisions of the Act. Section 13 provides that the Majlis shall be a body corporate and may sue and be sued, acquire, hold and sell property and generally do and perform such acts and things as bodies corporate may be law do and perform. Section 41(1) empowers the Majlis to raise loans for the purposes as stipulated in the section with the consent of the State Authority, and s. 42(1) and (2) enable the Majlis to mortgage or charge or create and issue debenture stock in respect of its assets as securities for loans so raised with the approval of the State Authority. By s. 46(1), with the approval of the State Authority, the Majlis is empowered to borrow for the purpose of carrying out any development for residential, commercial and industrial undertakings, and under subsection (2) the loan may be secured by

mortgage or charge or debenture upon the assets and the revenues derived from the assets, in respect of which the money is borrowed. Finally, s. 49 empowers the Majlis to obtain overdrafts from any bank and such overdrafts shall, unless covered by fixed deposits with the same bank, require the approval of the State Authority.

In my view, from the said provisions, it is manifestly clear that the intention of Parliament is to ensure that the Majlis is not unnecessarily saddled with debts beyond its means to pay which may adversely affect its authority, integrity and efficiency, and also to safeguard its assets from improper disposal. That is the rational behind the need to obtain the consent or approval of the State Authority. In a nut-shell, the Majlis is empowered by the Act only to borrow or obtain overdraft.

Nowhere in the Act that the Majlis is either expressly or impliedly empowered to give a guarantee. To my mind, on this ground alone the charge created in consequence of the said guarantee is null and void being *ultra vires*. Even, if assuming that the approval of the State Authority had been obtained to create the charge the position is still the same because the Majlis has no power to give the guarantee and by analogy from the provisions of Article III of the Federal Constitution where 'borrow' and 'guarantee' are treated separately, 'borrow' in the Act does not include 'guarantee'. It may be argued that, by reason of Clause 8 (Personal liability of Chargors) and Clause 41 (Chargors as principal debtors) of the Charge Annexure, the transaction can be or ought to be regarded as a loan transaction and hence, the transaction is authorised by the Act. In my opinion, the position is still the same because in substance the transaction is a guarantee, and if I am wrong in this respect, that is to say, the transaction ought to be regarded as a loan transaction, my view is that, since the approval of the State Authority was not obtained to create the charge the transaction is still null and void under the broad concept of *ultra vires*. The fact that the title to the said land does not contain any restriction on creation of the charge does not alter the position. No doubt that by virtue of s. 13 of the Act, the Majlis as a body corporate, has the power of charging its land under s. 241 of the Code. However, that power must be exercised in accordance with what is authorised by the Act *viz*. the power to borrow and to mortgage or charge its land under ss. 41, 42 and 46. This interpretation is in consonance with the expression '... generally do and perform such acts and things as bodies corporate may by law do and perform' appearing in s. 13 of the Act. Since the Majlis has no power to give a guarantee in consequence of which the charge was created it cannot exercise the power of charging under the Code. I am fortified in my view by the provision of s. 241(3)(a) of the Code which reads:

(3) The said powers shall be exercisable in any particular case subject to:

(a) any **prohibition** or limitation imposed by this Act or **any other written law** for the time being in force;
(Emphasis is mine)

To my mind, prohibition therein includes what is taken to be prohibited by the doctrine of *ultra vires* as stated in paragraph 5 above. Any other written law includes the Act.

With regard to the contention of the learned Counsel for the applicant that the giving of the guarantee and the creation of the charge are reasonable and incidental to the carrying into effect of the Majlis' statutory purpose, let me set out the provisions of s. 101(gg) and (hh) of the Act first.

101. In addition to any other powers conferred upon it by this Act or by any other written law a local authority shall have power to do all or any of the following things, namely -

(gg) to carry out any development, either by itself or with any other local authority or person, for residential, commercial, industrial or any other undertaking which the local authority may determine; and

(hh) to incur all expenditure necessary for civic receptions authorised by the local authority or for the carrying out of any purpose of this Act or of any purpose not specially provided for in this Act which the local authority may determine to be a purpose calculated to facilitate or is conducive to or incidental to the exercise by the local authority of its powers and duties under this Act.

With regard to subsection (gg), my view is that, it merely empowers the Majlis to do what are stated therein but not to the extent of empowering it to give a guarantee and to create a charge of its land for the purpose. With due respect, it is absurd to suggest that under this further power the Majlis can give the guarantee and create the charge of its land without the need to obtain the consent or the approval of the State Authority and whereas to borrow and to create the charge under ss. 41, 42 and 46 of the Act it must obtain such consent or approval. This interpretation is repugnant to the wisdom of Parliament as stated above. In respect of subsection (hh), to my mind, it merely empowers the Majlis to incur expenses for the purposes stipulated therein short of empowering it to give the guarantee and to create the charge without the consent or approval of the State Authority otherwise it would lead to the same absurdity. Therefore, the giving of the guarantee and the creation of the charge are clearly not reasonable and not incidental to the carrying into effect of the Majlis' statutory purpose.

As the issue is purely of law and has been extensively argued before me with the necessary documents produced, unlike in the case of *Tan See v. Wing Tiek Holdings Bhd. (formerly known as Wing Tiek Hardware Sdn. Bhd.)* [1992] 1 CLJ 78, I am now in a position to decide the issue. Hence, I conclude that the guarantee and the charge are null and void. And by virtue of s. 340(2)(b) of the Code the applicant's interest in the land shall not be indefeasible because the registration was obtained by means of a void instrument.

Therefore, the application is dismissed with cost.